**U.S. Department of Labor**

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**Issue Date: 26 June 2003**

CASE NUMBER: 2002-LHC-492

OWCP NO.: 07-151700

IN THE MATTER OF

LAWRENCE KEYS,
Claimant

v.

CERES GULF, INC.,
Employer

APPEARANCES:

William S. Vincent, Jr., Esq.
On behalf of Claimant

W. Chad Stelly, Esq.
Scott McQuaig, Esq.
On behalf of Employer

Before: Clement J. Kennington
Administrative Law Judge

## DECISION AND ORDER AWARDING BENEFITS

This is a claim for benefits under the Longshore and Harbor Workers' Compensation Act (the Act), 33 U.S.C. § 901, *et. seq.*, brought by Lawrence Keys (Claimant), against Ceres Gulf, Inc. (Employer). The issues raised by the parties could not be resolved administratively, and the matter was referred to the Office of Administrative Law Judges for a formal hearing. The hearing was held on April 24, 2003, in Metairie, Louisiana.

At the hearing all parties were afforded the opportunity to adduce testimony, offer

documentary evidence, and submit post-hearing briefs in support of their positions. Claimant testified and introduced twenty-four exhibits, twenty-three of which were admitted, including: Claimant's Department of Labor File; the deposition of Dr. Laborde; trial testimony of Dr. Phillips; medical records of Drs. Ed Ryan, Phillips, and Laborde; medical records from Carondelet Clinic; correspondence with Pat Benfield; a U.S. District Court judgment and notice of appeal.[1] Employer introduced fifteen exhibits, eleven of which were admitted, including: Employer's First Report of Injury; Claimant's earning records; medical records and bills from Dr. Lombardo/Carondelet Clinic; medical records and bills from Dr. Monroe Laborde, and Dr. Stewart Phillips; vocational reports and a labor market survey of Nancy Favaloro; Claimant's W-2 records; and OWCP records. After the formal hearing, Employer noticed the deposition of Nancy Favaloro, which I admit into evidence.

Post-hearing briefs were filed by the parties. Based upon the stipulations of the parties, the evidence introduced, my observation of the witness demeanor and the arguments presented, I make the following findings of fact, conclusions of law, and order.

## I. STIPULATIONS

At the commencement of the hearing the parties stipulated and I find:

1. The injury/accident occurred on December 4, 1998;

2. Claimant was injured in the course and scope of employment and an employer-employee relationship existed at the time of the accident;

3. Employer was advised of the injury on December 4, 1998;

4. Notices of Controversion were filed on August 8, 2000, and December 18, 2000;

5. An informal conference was held on October 25, 2000;

6. Claimant's average weekly wage at the time of the injury was $1,393.97;

7. Without a formal award, Employer paid the following benefits:

| | |
|---|---|
| Temporary Total Disability: 1/11/99 - 1/31/99 | $871.76 per week |
| Temporary Total Disability: 8/17/99 - 6/05/00 | $871.76 per week |
| Permanent Partial Disability: 6/6/00 - 1/23/03 | $711.98 per week |

[1] References to the transcript and exhibits are as follows: trial transcript- Tr.__; Claimant's Exhibits- CX __, p.__; Employer Exhibits- EX __, p.__; Administrative Law Judge Exhibits- ALJX __, p.___.

8. Employer paid medical expenses except for expenses associated with treatment of an alleged neck injury up to January 23, 2003.

## II. ISSUES

The following unresolved issues were presented by the parties:

1. Compensability for an alleged neck injury;

2. Nature and extent of disability and date of maximum medical improvement;

3. Claimant's entitlement to benefits and residual wage earning capacity;

4. Nature and extent of Employer's credit for benefits paid;

5.Section 8(f) relief; and

6. Interest and attorney's fees.

## III. STATEMENT OF THE CASE

### A. Chronology

Claimant, born in 1949, received a high school education and began working on the waterfront in 1968. (CX 5, p. 1; EX 7, p. 1). In 1973, Claimant suffered a workplace injury to his leg, which necessitated surgery, and which resulted in "permanent" work restrictions of no carrying heavy loads, walking on beams, climbing heights or excessive climbing of ladders. (EX 13, p. 27-29). As Claimant's physician had predicted, Claimant was able to do more over time, and he eventually returned to heavy work on the waterfront. *Id*. at 31-32; (Tr. 58). In May, 1987, Claimant sustained a second workplace accident injuring his eye, which resulted in a three percent permanent impairment to his vision. (EX 9, p. 3). Following his eye injury, Claimant was able to continue his former job at a heavy level of exertion. *Id*. at 13. On December 4, 1998, Claimant suffered another workplace accident when a iron rod struck him in the shoulder. (EX 4, p. 1). Claimant was able to return to work, but by August 2, 1999, Claimant related to his physician, Dr. Laborde, that his shoulder pain was such that he could no longer climb ladders at work and he consented to surgery. (CX 7, p. 20).

Following surgery, Claimant entered a work hardening program, and on December 22, 1999, his physician opined that Claimant would not be able to resume his former job.(CX 7, p. 9). Claimant had permanent work restrictions of no lifting over fifty pounds and no climbing rung type ladders. *Id*. Claimant did not return to work, and on March 23, 2000, he began treatment with Dr. Phillips, who opined that Claimant's shoulder pain may be a result of a cervical injury. (CX 6, p. 4). When Carrier denied liability for Dr. Phillips's diagnostic recommendations, Dr. Phillips placed Claimant on total

disability status. *Id*. at 9. Meanwhile, on April 17, 2000, Employer's vocational rehabilitation expert identified alternative employment for Claimant based on the restrictions set by Dr. Laborde. (EX 7, p. 5-6). On June 6, 2000, Claimant began to care for his disabled nephew, which was a part-time job paying $5.35 per hour. (Tr. 99-101; CX 24).

In January, 2003, Dr. Phillips retired, and Claimant's treatment taken over by Dr. Watermeier, who discharged Claimant on January 15, 2003. (CX 6, p. 34). On February 11, 2003, a federal district court judge issued a determination in Claimant's third party litigation awarding damages of $472,000.00 plus pre-judgment interest. After entry of the judgment, Employer suspended Claimant's compensation pursuant to 33 U.S.C. § 933(f), but the defendant posted a supersedeas bond appealing the judgment to the Fifth Circuit Court of Appeals. Because Claimant's job taking care of his nephew ended on February 12, 2003, Claimant found himself without a paycheck or tort recovery, and by the date of the formal hearing he had obtained a job as a security guard paying a minimum of $6.50 per hour. (Tr. 96).

**B. Claimant's Testimony**

Claimant testified that he was a life long resident of New Orleans, Louisiana. (Tr. 56). Following his 1971 leg injury, Claimant testified that he was on Social Security Disability for about seven or eight years, but he was able to increase his physical endurance so that he could engage in heavy work on the waterfront, and he passed a physical for New Orleans Steamship Association. (Tr. 58). Claimant testified that his ankle did not limit his activities in any way. (Tr. 59). Also, Claimant never knew that he had a permanent partial impairment to his eye until the day of the formal hearing. (Tr. 60). Regarding the event of his workplace accident, Claimant testified:

> [I]t was on the ship M/V Longevity, and a rod - - container rod - - we was un-lashing container, and we was un-lashing the rods, and the rod slipped out of the whole (sic) and hit me on my shoulder. . . . [The rods weighed] maybe about twenty-five pounds, or something like that; heavier.

(Tr. 60-61).

Regarding his vocational rehabilitation interview with Ms. Favaloro, Claimant testified that she provided him some types of jobs that he may be able to perform, but he never received any information on where to apply for a job that was available. (Tr. 92-93). Claimant attempted to apply for a job as a security guard at Merchant Security, Major Thibodeaux, and Weiser Security, all in the New Orleans area, but he was never contacted about a position. (Tr. 94). Pay for those jobs ranged from $5.35 to $6.00 per hour. (Tr. 94-95). Two weeks prior to the formal hearing, Claimant re-applied for a job at Weiser Security, which was now paying $6.00 per hour, but he was instructed that the job entailed lifting a seventy pound gate and that he had to squat to read gauges. (Tr. 95). Claimant had also applied for that job in May, 2000. (Tr. 110). Two and a-half weeks ago Claimant

applied for a position with Bayou State Security, he was interviewed, given a drug test, and was told that he would be hired at the rate of $6.50 to $7.00 per hour. (Tr. 96).

Claimant also applied at Harrah's Casino for a surveillance job, but his application was rejected because he did not have enough experience. (Tr. 102). Claimant applied for similar positions at Boomtown Casino, but he was passed over in favor of an applicant that better fitted its needs. (Tr. 104-05). Claimant also applied at the Treasure Chest Casino, but he had not received any response. (Tr. 105). When Claimant attempted to obtain a position as a bus driver, he was rejected because he did not have a CDL license. (Tr. 107). Claimant also applied for a position as a toll booth operator at the Greater New Orleans Connection Bridge, the job paid $6.00 per hour, but it required Claimant to use his left hand all day. (Tr. 107-08). Nevertheless, Claimant filled out an application. (Tr. 108). Other places that Claimant applied to about three weeks prior to the formal hearing consisted of Vinson Security Guard, which did not call him back for an interview, and National Car Rental. (Tr. 109-110). Two months ago Claimant applied for a position as a security guard with Alamo, which paid $5.60 per hour, but Claimant never heard back for that employer. (Tr. 111). At Budget Rent-a-Car- Claimant applied for a job as a service agent three weeks prior to the formal hearing, the job paid $7.75 per hour, and it entailed washing and preparing cars that customers return. (Tr. 111-12). Claimant applied for a job as a driver for Budget Rent-a-Car, but he did not have a CDL license. (Tr. 112-13). Claimant also applied at National Rent-a-Car Services, but he had not been called back for an interview. (Tr. 113).

Claimant applied for a job at Home Depot three weeks prior to the formal hearing as a kitchen and bath saleman, but he had not been called back for an interview. (Tr. 114). Regarding Ms. Favaloro's statement that Claimant could drive a forklift, Claimant testified that he did not think he could perform that job. (Tr. 119). Claimant had driven forklifts in the past, but he had never operated one. (Tr. 119). Also, whenever sacks of goods fell off the forklift, the driver was often the only person around who was available to pick up the fallen items. (Tr. 121). Regarding his statement that he could earn eight, nine or ten dollars an hour, Claimant explained that he was filling out applications, and if he was qualified for the job and someone hired him then he had the potential to earn such hourly amounts. (Tr. 128-29). The only job offer Claimant had received was $6.50 an hour, and Claimant was to start that job the week following the formal hearing. (Tr. 129).

From 2000 to 2001, Claimant worked for Community Connection through Pristan Care Server, caring for his mentally retarded nephew who was also an epileptic. (Tr. 99). Claimant received his last check on February 12, after his nephew turned twenty-one years of age. (Tr. 99-100). Claimant only worked for twenty-hours a week, and Claimant testified that he could have performed that job on a forty-hour week basis. (Tr. 100-01).

Despite the fact that Claimant testified in federal court in January, 2003, that he never complained to Dr. Laborde about any neck pain, Claimant testified at the formal hearing that he mentioned neck area pain to Dr. Laborde. (Tr. 147). Reconsidering the matter, Claimant testified that he never complained to Dr. Laborde about neck pain. (Tr. 153). Claimant would like to have a cervical MRI to see if that was where his pain was originating. (Tr. 181).

**C. Exhibits**

**(1) Deposition of Dr. Joseph Licciardi**

On February 8, 1973, Dr. Licciardi testified that he began treating Claimant in the emergency room at Baptist Hospital on March 24, 1971, for an injury Claimant sustained to his left leg. (EX 13, p. 4). Claimant had an open fracture of both bones of the left leg - the tibia and fibula. *Id*. at 5. Claimant had also sustained a low back strain, a contusion to the left elbow, and x-rays demonstrated bilateral congenital spondylolisthesis. *Id*. By April 29, 1971, Claimant's left elbow was not bothering him at all, but he still had some aching pain in his low back. *Id*. at 12. In January, 1973, Dr. Licciardi released Claimant from his care. *Id*. at 24. Regarding his leg injury, Dr. Licciardi opined that Claimant should refrain from working on his ankles for more than eight to ten hours a day, and he did not think Claimant could carry heavy loads due to his reports of pain. *Id*. at 27. Also Dr. Licciardi advised against walking on beams or climbing heights with a load because of his weak ankle. *Id*. at 27-28. While Claimant could climb ladders, Dr. Licciardi stated Claimant should not climb ladders on an hourly basis. *Id*. at 29. Over time Dr. Licciardi expected Claimant to be able to do more and more as he becomes more tolerant of his ankle problems. *Id*. at 31-32.

**(2) OWCP Record No. 07-107144 "Lawrence Keys v. Cooper/T Smith;" OWCP Record No. 07-121839 "Lawrence Keys v. Ceres Gulf, Inc."**

From May 14, 1987 to June 25, 1987, Claimant received temporary total disability payments, and subsequently received a permanent partial award for a three percent impairment to his eye. (EX 9, p. 3). Following his workplace accident, Claimant was able to return to work at full duty. *Id*. at 13.

On February 21, 1991, Claimant fell, injuring his wrist, and he received temporary total disability compensation from February 25, 1991 to March 1, 1991. (EX 10, p. 2, 9). On March 2, 1992, Claimant was released to return to work without restrictions. *Id*. at 2.

**(3) Medical Records of Dr. Lombardo/Carondelet Clinic**

On December 4,1998, Claimant presented to Dr. Lombardo complaining that he was struck in the shoulder by an iron rod while he was unlatching a box type container. (EX 4, p. 1). Dr. Lombardo diagnosed a contusion to Claimant's left shoulder/scapula region, and after x-rays were negative, he opined that Claimant may attempt to return to work on the following day. *Id*.

**(4) Medical Records, Deposition, and Trial Testimony of Dr. J. Monroe Laborde**

On December 11, 1998, Dr. Laborde, an orthopaedic surgeon, examined Claimant and noted that x-rays of his shoulder showed a slight pointing of the AC joint consistent with the aging process. (CX 7, p. 32). In his opinion, Claimant had sustained a left shoulder injury, surgery would not be necessary, and Claimant should continue physical therapy. *Id*. If Claimant's pain symptoms continued into the following week, Dr. Laborde concurred that an MRI of the left shoulder would be appropriate. *Id*. When Claimant continued to complain of pain on December 28, 1998, such that he could only work three days a week, Dr. Laborde recommended an MRI. *Id*. at 30. On January 11, 1999, Dr. Laborde noted that the MRI only showed AC arthritis, but Dr. Laborde advised Claimant to discontinue physical therapy and remain off from work for two weeks to see if his pain decreased. *Id*. at 29. When Claimant returned on January 25, 1999, he continued to complain of shoulder pain, but he had a full range of motion in the shoulder. *Id*. at 28. After administering an injection, Dr. Laborde opined that Claimant could return to work without restriction on February 1, 1999. *Id*. at 28.

After a week of working without restrictions, Claimant returned to Dr. Laborde on February 8, 1999, complaining of continued pain. (CX 7, p. 26). By March 18, 1999, Dr. Laborde counseled Claimant about undergoing a surgical resection of the distal clavical which may address his pain, but it would also weaken his shoulder. *Id*. at 24. On May 4, 1999, Dr. Laborde reported that Claimant was ninety-five percent better. *Id*. at 23. By June 14, 1999, however, Claimant returned with shoulder complaints, and x-rays revealed some degenerative arthritis with some absorption of the distal clavical. *Id*. at 22. Dr. Laborde opined that the reoccurrence of pain was due both to a continuation of Claimant's workplace injury and a continuation of a long standing problem. (CX 2, p. 21). By August 2, 1999, Claimant consented to have surgery after he could no longer climb ladders at work. (CX 7, p. 20). Dr. Laborde performed shoulder surgery on August 18, 1999. *Id*. at 19.

On September 14, 1999, Claimant returned to Dr. Laborde for a follow-up examination and Dr. Laborde noted that Claimant's wound had nearly healed. (CX 7, p. 17). Dr. Laborde began Claimant on a physical therapy program for full range of motion exercises. *Id*. By September 30, 1999, Dr. Laborde instructed Claimant to discontinue use of his sling and to begin a work hardening program, but because Employer did not have a light duty position for him, Claimant reported that he could not return to work. *Id*. at 16.

By December 2, 1999, Claimant reported that he could lift up to thirty pounds, but his pain increased with any additional weight. (CX 7, p. 10). Claimant did not feel capable of returning to his former employment and his work hardening therapy notes indicated that he was making limited progress. *Id*. Dr. Laborde advised that Claimant was going to either work in pain or change to some lighter work with a fifty pound lifting restriction. *Id*. On December 22, 1999, Dr. Laborde noted that Claimant would not be able to reach the one-hundred pound lifting requirement to engage in heavy work. *Id*. at 9. Dr. Laborde opined that a better course of action was to engage Claimant in vocational rehabilitation with restrictions of no lifting over fifty pounds, and no climbing rung type ladders. *Id*. On February 2, 2000, Dr. Laborde opined that Claimant had reached maximum medical improvement and he reiterated his restrictions. *Id*. at 7. On further reflection, Dr. Laborde stated that Claimant's actual date of maximum medical improvement was his December 22, 1999 examination,

and Dr. Laborde also stated that he would further restrict Claimant from prolonged periods of overhead work. (CX 2, p. 27, 33). Claimant's final diagnosis was acromioclavicular arthritis with a superimposed injury or contusion, persistent pain, a surgical resection of the distal clavical with acromioplasty with resulting pain and weakness. *Id*. at 28. At the formal hearing, Dr. Laborde testified that Claimant reached maximum medical improvement on November 20, 1999, three months after his shoulder surgery. (Tr. 12).

On April 17, 2000, Dr. Laborde reported that Claimant never complained of thumb numbness to him, and in his opinion, overgrowth of bone impinging on the old clavicular joint was not a likely source of Claimant's pain. (CX 7, p. 5). On April 25, 2000, Dr. Laborde approved jobs as a security representative, kitchen cabinet salesperson, surveillance observer, and a toll collector for Claimant. *Id*. at 3-4. It was possible that Claimant could perform a job as a forklift operator, but Dr. Laborde was not certain if he could approve that job for Claimant. *Id*. at 4. More specifically, Dr. Laborde was unsure if Claimant could lift the fifty pounds that the job required. (Tr. 14). On June 19, 2000, Dr. Laborde reported that Claimant never relayed any neck complaints to him, but he would not be surprised if Claimant had some arthritis in his neck due to the aging process. *Id*. at 2. Any neck injury Claimant sustained was probably not related to his workplace accident considering the fact that Claimant never complained of neck pain during his fifteen months of treatment. (Tr. 15).

Based on Claimant's shoulder injury, Dr. Laborde assigned Claimant a twenty-five to forty percent impairment to his shoulder, which translated to a six to ten percent impairment to Claimant's arm, which was a permanent disability. (Tr. 16). Based on Claimant's 1971 leg injury, Dr. Laborde opined that Claimant likely sustained a twenty to thirty percent impairment to his ankle, which translated in to a seven to ten percent impairment to Claimant's leg. (Tr. 17-18). Based on Claimant's spondylolisthesis that was present in 1971, Dr. Laborde opined that he would assign Claimant a five percent whole body impairment if it was not painful, and a ten percent whole body impairment if it was painful. (Tr. 18). The fact that Claimant had spondylolisthesis made him more prone to suffer from a back injury. (Tr. 18). Normally, a patient with spondylolisthesis would be restricted from heavy work because of the increased risk of suffering a back injury. (Tr. 20). In light of Claimant's pre-existing disabilities and his subsequent arm/shoulder injury, Dr. Laborde testified that Claimant was more disabled today than he would have been based on his subsequent shoulder injury alone. (Tr. 21). In fact, Claimant's pre-existing physical impairments rendered him materially and substantially more disabled than he would have been based on his shoulder injury alone. (Tr. 22, 32-33).

Regarding Dr. Phillips's recommendation for a cervical MRI to determine if Claimant's neck was involved in his shoulder pain, Dr. Laborde testified that the neck was not the most likely cause of shoulder pain, but if a physician wanted to be totally complete he should look at the neck as a source of arm and shoulder symptoms. (Tr. 26). Dr. Laborde testified that he had not reviewed the CT scan and MRI films done under Dr. Phillips. (Tr. 31).

**(5) Medical Records from Touro Rehabilitation Center**

On December 20, 1999, physical therapist Pegi Gaudet reported that Claimant attended a

work hardening program beginning on October 12, 1999, and that Claimant demonstrated moderate progress. (EX 12, p. 1). Claimant was limited from advancing further due to subjective complaints of pain, complaints of nausea, and difficulty breathing. *Id*. Ms. Gaudet also noted that Claimant had "unusual work behaviors" and had "great difficulty processing verbal instruction." *Id*. Nonetheless, Claimant did show up as scheduled and he only missed 1.5 days due to family issues. *Id*. Reasoning that Claimant's former job required work at the very heavy demand level, Ms. Gaudet opined that it was doubtful that Claimant could return to that level of employment. *Id*. at 2.

**(6) Medical Records and Trial Testimony of Dr. Stewart Phillips**

On March 23, 2000, Dr. Stewart, an orthopaedic surgeon, examined Claimant for the purposes of rendering a second opinion. (CX 6, p. 2). Claimant primarily complained of left shoulder pain, and he related that he had pain and weakness in his left thumb. *Id*. at 3. Dr. Phillips's cervical exam was normal, but x-rays of Claimant's left shoulder caused Dr. Phillips to question whether there was a periosteal overgrowth of new bone which was impinging on the old clavicular joint. *Id*. at 3-4. To determine why Claimant's shoulder pain persisted, Dr. Phillips stated that he could not compartmentalize the body and he needed to examine Claimant's cervical spine, which often mimics shoulder pain. *Id*. at 4. Claimant's absent biceps reflex and numbness in his thumb were both indications of a problems with the C5 nerve root. *Id*. The manner in which claimant sustained his injury also suggested that he may have sustained a forced flexion/rotation stress to his neck. *Id*. Alternatively, Claimant may have an incomplete excision or regrowth of bone into the acromioclavicalar joint. *Id*. Accordingly, Dr. Phillips recommended a cervical MRI and an MRI of the shoulder as well as plain x-rays of the neck, an electromyogram and nerve conduction studies in both upper extremities. *Id*. When the testing was not approved by April 20, 2000, Dr. Phillips opined that Claimant was not able to return to work. *Id*. at 9. On May 27, 2000, Dr. Phillips explained:

> The differentiation of neck and shoulder pain is difficult. It must be kept in mind that the nerve supply to the shoulder comes from the neck, and that a C5-6 or C4-5 disc can totally mimic a shoulder problem. If this is not done, an occasional cervical disc will be missed; and it will be thought that the patient has a shoulder problem. Many patients will have shoulder pain when that have a neck problem, and no have any symptoms of neck pain. Accordingly, I believe that to make a decision as to whether or not a patient has a "neck injury" on the basis of whether he had "neck pain," rather than whether he had discomfort in the general area of distribution of the nerves, is probably not correct.

(CX 6, p. 12).

On October 26, 2000, Dr. Phillips reported that he had received a report authored by Dr. Laborde that Claimant did not have neck pain because Claimant never complained of neck pain. (CX 6, p. 13). Dr. Phillips stated that nothing could be further from the truth, and he opined that Dr. Laborde should review his standard text on medicine. *Id*. An MRI of the right shoulder taken on November 11, 2000 revealed that there was an irregular appearance of the shoulder joint with a low

signal structure which suggested a spur or metallic artifact, which suggested impingement of the supraspinatus tendon. *Id*. at 14-15. An MRI of the left shoulder performed on the same day appeared identical to the right shoulder. *Id*. at 16-17. On November 6, 2000, Dr. Phillips stated that Claimant remained disabled while awaiting a cervical MRI. *Id*. at 19.

An x-ray of Claimant's cervical spine taken on June 14, 2001, demonstrated a cervical spasm and a degenerated fifth cervical disc. (CX 6, p. 25). Dr. Camalyn W. Gaines interviewed and examined Claimant that same day regarding Claimant's complaints of left shoulder pain. *Id*. at 26. Dr. Gains recommended an EMG nerve conduction study to rule out any cervical radiculopathy of the left upper extremity. *Id*. at 28. Dr. Gains further restricted Claimant to avoiding repetitive crawling due to his left shoulder limitations, and she recommended that Claimant not lift over ten to fifteen pounds with his left upper extremity and that any lifting should be limited below his shoulder level. *Id*.

In a computed tomography of Claimant's left shoulder, dated August 16, 2001, Claimant was noted to have an irregular spur-like complex extending from the acromion process of the scapula, which possibly represented a post-traumatic change. (CX 6, p. 29). On April 9, 2002, Dr. Phillips lamented that no cervical testing had been approved, and he opined that in the absence of a cervical work-up, Claimant would remain symptomatic as well as totally and permanently disabled. *Id*. at 30. On August 29, 2002, Dr. Phillips remarked that Claimant's cervical x-ray demonstrated spondylosis at C5. *Id*. at 32. Dr. Phillips continued Claimant's permanent and total disability status. *Id*.

After Dr. Phillips retired in January, 2003, Claimant began treatment with Dr. Watermeier at the same office. (CX 6, p. 33-34). On January 15, 2003, Dr. Watermeier discharged Claimant as he had reached MMI for his shoulder treatments. *Id*. at 34. Dr. Watermeier stated that Claimant could see a pain management physician for medication as necessary, and he diagnosed Claimant as having shoulder impingement syndrome and bursitis. *Id*. Claimant was released to return to light duty work. *Id*.

During third party litigation, Dr. Phillips testified that the spur which had regrown after Claimant's shoulder surgery was the cause of his problems. (CX 3, p. 11). Because Claimant only suffered intermittent moderate pain from his shoulder, Dr. Phillips did not recommend any further surgery to remove the spur. *Id*. at 17-18.

**(7) Deposition, Vocational Report, and Labor Market Surveys of Nancy Favaloro**

On March 16, 2000, Ms. Favaloro reported that Claimant was born in 1949, was married, and had two grown children. (EX 7, p. 1). Claimant had a valid driver's license with no restrictions, and he was able to drive around the New Orleans area. *Id*. Claimant graduated high school in 1967, and he joined the ILA in 1969. *Id*. at 2. Claimant worked primarily as a lasher and holdman, he occasionally operated forklifts, but he did not operate winches or cranes because he did not like heights. *Id*. In vocational testing, Claimant demonstrated academic abilities at the 6.7 grade level in letter word identification, 11.0 grade level in passage comprehension, 6.2 grade level in calculation,

and 9.4 grade level in applied problems. *Id*. at 3. Using the restrictions set by Dr. Laborde, consisting of no lifting over fifty pounds, and no climbing rung type ladders, Ms. Favaloro opined that Claimant was employable in the New Orleans area. *Id*. at 2-3. On April 17, 2000, Ms. Favaloro conducted a labor market survey identifying the following jobs in Claimant's community as suitable:

> **Security Representative.** This worker will utilize a small hand-held computer to log vehicle information as customers enter/exit the car rental lot. He will also be responsible for checking the rental contract against the vehicle as the customers enter/exit the rental lot. On the job training is provided. This is considered to be "very light." The computer weighs less than 10 pounds. He will be stationed at the booth which is located at the entrance or exit of the lot. It is air conditioned. He will alternately sit, stand and walk in this position. Wages are $7.75 per hour.
>
> **Sales, Kitchen Cabinet Department.** On the job training is provided to this worker who will meet with customers to assist them in the selection of kitchen cabinets and related items. He will provide information regarding price of product and availability. He will alternately sit, stand and walk in this position and will mainly stand and walk while working. The lifting is under 20 pounds. Wages are $7.00 to $8.00 per hour.
>
> **Surveillance Observer.** This is a sedentary position with the ability to alternate to standing and walking occasionally. The lifting is approximately 10 pounds. It is an unarmed position where the worker will conduct clandestine surveillance of the areas in a casino. It will include reviewing, maintaining and filing videotapes and other evidence used in surveillance. On the job training is provided to someone who can work independently. Wages are approximately $10.00 per hour.
>
> **Forklift Operator.** This worker will operate a forklift to move objects around the convention center. He may occasionally have to lift up to 50 pounds to move objects by hand. He is mainly seated while operating the forklift. Wages are $8.00 per hour.
>
> **Toll Collector.** This worker will collect fees from motor vehicles as they pass through the local toll booth. He will provide correct change and receipts as necessary. He will complete a report at the end of the shift after balancing his cash drawer. He will keep records. On the job training is provided to someone who will alternately sit and stand while working. He will do light reaching with one upper extremity to receive money and provide change. Wages are $7.50 per hour.

(EX 7, p. 5-6).

On May 8, 2000, Ms. Favaloro reported that she interpreted Dr. Laborde's possible approval of the job as a forklift operator as an indication that Claimant was capable of performing that job. (EX 7, p. 14).

On January 6, 2003, Ms. Favaloro reported that she had attempted to obtain information from Dr. Phillips regarding Claimant's medical condition, but she was without success. (EX 7, p. 17). Ms. Favaloro also stated that Claimant could engage in the following employment in the New Orleans area: security jobs paying $7.00 to $8.00 per hour; cashier jobs paying $6.50 per hour; a customer safety dispatcher earning $8.17 per hour; a cashier in a home improvement store earning $7.00 to $8.00 per hour; and production work paying $8.00 per hour. (EX 7, p. 19). In her post-hearing deposition, dated June 6, 2003, Ms. Favaloro testified the position as a security representative was with Hertz-Rent-A-Car, the kitchen sales position was with Home Depot, the surveillance officer was with Boomtown Casino, the forklift operator was with New Orleans Convention Center, and the toll collector was with Crescent City Connection. (EX 15, p. 12-13). Ms. Favaloro reiterated that the pay for a toll collector was $7.50 per hour, *id.* at 14, that the cashier jobs in the New Orleans area pay $6.50 to $8.00 per hour, *id.* at 17-18, and depending on the contract, a job as a security guard generally paid $5.50 - $7.00 per hour. *Id.* at 27-28. While the job as a surveillance officer currently required experience, it did not in 2000. *Id*. at 22. Claimant was also capable of performing a job as a shuttle bus driver, which paid $8.00 to $9.50 per hour, but there were no openings at the time she conducted her labor market survey. *Id*. at 18. Claimant could also perform production work at Alfax, which paid $7.50 for ninety days before increasing to $8.00 per hour. *Id*. at 47.

Ms. Favaloro opined that Claimant had a wage earning capacity between $7.00 and $10.00 per hour on April 17, 2000, and by January 3, 2003, Claimant had an earning capacity of $6.50 to $9.00 per hour. (EX 18, p. 20-21). Returning to work on the waterfront as a forklift operator, Ms. Favaloro opined that Claimant could earn $14.00 per hour. *Id*. at 21.

**(8) Vocational Report and Testimony of Ed Ryan**

On April 11, 2003, Mr. Ryan, a vocational consultant, noted that Claimant was fifty-three years old, had a high school education, and he had been working on the river-front since 1968. (CX 5, p. 1). Based on the restrictions set by Dr. Laborde and Phillips, which restricted Claimant to lifting less than fifty pounds, no repetitive use of the left shoulder, and no overhead work with his left upper extremity, Mr. Ryan opined that Claimant could not perform work as a forklift operator. *Id*. at 1-2. Driving a forklift required using all four extremities and it was impossible for Claimant to operate a forklift without using his left shoulder. (Tr. 188). Mr. Ryan further stated:

> Other job categories listed in the Vocational Rehabilitation Report dated January 6, 2003 include cashier, security, toll collector, customer safety dispatcher and production work. My knowledge of the New Orleans area indicates starting pay for most cashier jobs is $5.15 to $6.50 per hour and $ 5.50 to $7.00 for security work . . . . [E]ntry level pay for cashiers in the New Orleans area [is] $5.80 per hour and security guards [is] $6.13 per hour. The toll collector job is under Louisiana Civil Service. It is a non-competitive job and starting pay is $6.31 per hour. This job would be difficult for Mr. Keys to perform if it is set up as a left hand operation.

(CX 5, p. 2).

Mr. Ryan testified that the job as a toll collector could be performed standing in the opposite direction such that Claimant would only have to use his right arm. (Tr. 191). Regarding Ms. Favaloro's identification of production jobs, Mr. Ryan testified that such a description was too vague to be able to ascertain what specific jobs categories Ms. Favaloro was referring to. (Tr. 194). Production jobs ranged from assembly to repair to a machine operator, each with different requirements. (Tr. 194). Mr. Ryan have enough information to identify what type of work was involved in a dispatcher type position. (Tr. 201). As such, he did not think that Dr. Laborde could approve those jobs for Claimant. (Tr. 201). A cashier at Home Depot was required to lift forty pounds unassisted, and that job paid $7.90 per hour. (Tr. 195). Nothing in Claimant's background suggested to Mr. Ryan that Claimant had the aptitude to be a salesman, design kitchens, or use a computer. (Tr. 196). Mr. Ryan also stated that he did not see any limitations to Claimant obtaining a CDL driver's license and he opined that Claimant could perform a job as a shuttle bus driver making $8.90 per hour. (Tr. 210).

## IV. DISCUSSION

### A. Contention of the Parties

Claimant contends that he is entitled to treatment for his neck, as the neck and shoulder are so closely intertwined that the only way to know if the spur in the shoulder is Claimant's only problem is to have an MRI of the neck. Claimant contends that while he has had a residual earning capacity, it was only $214.00 based on an hourly rate of $5.35 from June 6, 2000 until April 27, 2003 when he was to start a security guard position with Bayou State Security paying $260 at $6.50 per hour. Claimant contends that on June 6, 2000 Employer incorrectly used a residual wage earning capacity of $326.00 or $8.15 per hour. Claimant further contends, that Employer improperly terminated compensation and medical benefits upon a Judgment being signed on February 11, 2003, in a third-party case for $472,000. The ship owner, Employer, and Claimant all appealed the Judgment and Claimant has not received, and will not receive any monies in connection with that Judgment, and until there is a recovery, Employer is responsible for compensation and medical benefits. Claimant contends that Employer, in addition to terminating compensation payments, has refused to pay prescription and medical bills since February 11, 2003.

Employer contends that Claimant is employable within the New Orleans area at a pay rate between $7.00 and $14.00 per hour, and that Claimant failed to make any reasonable efforts to secure alternative employment. Because Employer voluntarily paid benefits based on a post-injury wage earning capacity of $8.15 per hour, no further wage benefits are due. Also, Employer asserts that it does not owe Claimant any medical benefits for an alleged neck injury considering that Claimant made no complaints to his treating physician for fifteen months. Pursuant to the trial testimony of Dr. Laborde, Employer argues that Claimant reached maximum medical improvement on November 30, 1999. Finally, Employer contends that Section 8(f) relief is appropriate because Claimant's pre-

existing permanent partial impairments, which were manifested to Employer, combined with his workplace injury to render Claimant materially and substantially more impaired than he would have been based on his subsequent injury alone.

**B. Causation**

**B(1) The Section 20(a) Presumption - Establishing a *Prima Facie* Case**

Employer does not contest the fact that Claimant suffered a shoulder injury at work on December 4, 1998. Employer argues, however, that Claimant's workplace accident never injured his neck. Section 20 provides that "[i]n any proceeding for the enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary - - (a) that the claim comes within the provisions of this Act." 33 U.S.C. § 920(a) (2002). To establish a *prima facie* claim for compensation, a claimant need not affirmatively establish a connection between work and harm. Rather, a claimant has the burden of establishing only that: (1) the claimant sustained a physical harm or pain; and (2) an accident occurred in the course of employment, or conditions existed at work, which could have caused aggravated, or accelerated the harm or pain. *Port Cooper/T. Smith Stevedoring Co., Inc., v. Hunter*, 227 F.3d 285, 287 (5th Cir. 2000); *O'Kelly v. Department of the Army*, 34 BRBS 39, 40 (2000); *Kier v. Bethlehem Steel Corp.*, 16 BRBS 128, 129 (1984). Once this *prima facie* case is established, a presumption is created under Section 20(a) that the employee's injury or death arose out of employment. *Hunter*, 227 F.3d at 287. "[T]he mere existence of a physical impairment is plainly insufficient to shift the burden of proof to the employer." *U.S. Industries/Federal Sheet Metal Inc., v. Director, OWCP*, 455 U.S. 608, 102 S. Ct. 1312, 71 L. Ed. 2d 495 (1982). *See also Bludworth Shipyard Inc., v. Lira*, 700 F.2d 1046, 1049 (5th Cir. 1983) (stating that a claimant must allege injury arising out of and in the course and scope of employment); *Devine v. Atlantic Container Lines*, 25 BRBS 15, 19(1990) (finding the mere existence of an injury is insufficient to shift the burden of proof to the employer).

Here, Claimant complained to Dr. Phillips on March 23, 2000, that he had pain, weakness, and numbness in his thumb, and an absent biceps reflex. (CX 6, p. 3). These symptoms led Dr. Phillips to opine that Claimant may have problems with his C5 nerve root related to his workplace accident. *Id*. at 3-4. Dr. Phillips explained:

> The differentiation of neck and shoulder pain is difficult. It must be kept in mind that the nerve supply to the shoulder comes from the neck, and that a C5-6 or C4-5 disc can totally mimic a shoulder problem. If this is not done, an occasional cervical disc will be missed; and, it will be thought that the patient has a shoulder problem. Many patients will have shoulder pain when they have a neck problem, and not have any symptoms of neck pain. Accordingly, I believe that to make a decision as to whether or not a patient has a "neck injury" on the basis of whether he had "neck pain," rather

> than whether he had discomfort in the general area of distribution of the nerves, is probably not correct.

(CX 6, p. 12).

Accordingly, I find that Claimant presented a *prima facie* that he suffered a neck injury in his December 4, 1998 workplace accident inasmuch as a treating physician linked Claimant's symptoms to an injury to his cervical spine sustained during a workplace accident.

**B(2) Rebuttal of the Presumption**

"Once the presumption in Section 20(a) is invoked, the burden shifts to the employer to rebut it through facts - not mere speculation - that the harm was not work-related." *Conoco, Inc. v. Director, OWCP*, 194 F.3d 684, 687-88 (5th Cir. 1999). Thus, once the presumption applies, the relevant inquiry is whether Employer has succeeded in establishing the lack of a causal nexus. *Gooden v. Director, OWCP*, 135 F.3d 1066, 1068 (5th Cir. 1998); *Bridier v. Alabama Dry Dock & Shipbuilding Corp.*, 29 BRBS 84, 89-90 (1995) (failing to rebut presumption through medical evidence that claimant suffered an unquantifiable hearing loss prior to his compensation claim against employer for a hearing loss); *Hampton v. Bethlehem Steel Corp.*, 24 BRBS 141, 144-45 (1990) (finding testimony of a discredited doctor insufficient to rebut the presumption); *Dower v. General Dynamics Corp.*, 14 BRBS 324, 326-28 (1981) (finding a physician's opinion based of a misreading of a medical table insufficient to rebut the presumption). The Fifth Circuit further elaborated:

> To rebut this presumption of causation, the employer was required to present *substantial evidence* that the injury was not caused by the employment. When an employer offers sufficient evidence to rebut the presumption - the kind of evidence a reasonable mind might accept as adequate to support a conclusion - only then is the presumption overcome; once the presumption is rebutted it no longer affects the outcome of the case.

*Noble Drilling v. Drake*, 795 F.2d 478, 481 (5th Cir. 1986) (emphasis in original). *See also, Conoco, Inc.*, 194 F.3d at 690 (stating that the hurdle is far lower than a "ruling out" standard); *Stevens v. Todd Pacific Shipyards Corp.*, 14 BRBS 626, 628 (1982), *aff'd mem.*, 722 F.2d 747 (9th Cir. 1983) (stating that the employer need only introduce medical testimony or other evidence controverting the existence of a causal relationship and need not necessarily prove another agency of causation to rebut the presumption of Section 20(a) of the Act); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995) (stating that the "unequivocal testimony of a physician that no relationship exists between the injury and claimant's employment is sufficient to rebut the presumption.").

Employer presented substantial evidence to rebut Claimant's *prima facie* showing that he injured his neck in his December 4, 1998 workplace accident. First, Claimant testified that he never complained about neck pain for fifteen months following his workplace accident, and as Dr. Laborde testified, Claimant never mentioned any neck pain or related symptoms during his treatment. (Tr. 15,

153). Dr. Laborde also testified that Claimant likely had neck area pain due to the aging process, but any neck injury Claimant sustained was not related to his workplace accident because Claimant simply never complained of neck pain. (Tr. 2, 15). For the sake of completeness, Dr. Laborde suggested that Claimant could undergo a cervical MRI of the neck, but the neck was not a likely cause of Claimant's shoulder pain. (Tr. 26). Also, after Dr. Phillips retired, Dr. Watermeier, who took over Claimant's care from Dr. Phillips, discharged Claimant from his care opining that Claimant had reached maximum medical improvement, and Dr. Watermeier did not recommend any further diagnostic studies for Claimant's neck. (CX 6, p. 34). Accordingly, I find that Employer
presented substantial evidence to show that any neck injury Claimant may have suffered was not caused by his workplace accident.

**B(3) Causation on the Basis of the Record as a Whole**

If the presumption is rebutted, it no longer controls and the record as a whole must be evaluated to determine the issue of causation. *Del Vecchio v. Bowers*, 296 U.S. 280, 286-87, 56 S. Ct. 190, 193, 80 L. Ed. 229 (1935); *Port Cooper/T Smith Stevedoring Co. v. Hunter*, 227 F.3d 285, 288 (5th Cir. 2000); *Holmes v. Universal Maritime Serv. Corp.*, 29 BRBS 18, 20 (1995). In such cases, I must weigh all of the evidence relevant to the causation issue. If the record evidence is evenly balanced, then the employer must prevail. *Director, OWCP v. Greenwich Collieries*, 512 U.S. 267, 281, 114 S. Ct. 2251, 129 L. Ed. 2d 221 (1994). Based on the record as a whole, I find that Employer not only rebutted Claimant's *prima facie* showing of causation, but the same evidence used to rebut the presumption also established by a preponderance of the evidence that Claimant's alleged neck injury is not related to his workplace accident. Claimant failed to carry his burden of persuasion.

**C. Nature and Extent of Disability and Date of Maximum Medical Improvement**

Disability under the Act is defined as "incapacity because of injury to earn wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. § 902(10) (2002). Disability is an economic concept based upon a medical foundation distinguished by either the nature (permanent or temporary) or the extent (total or partial). A permanent disability is one which has continued for a lengthy period and is of lasting or indefinite duration, as distinguished from one in which recovery merely awaits a normal healing period. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968); *Seidel v. General Dynamics Corp.*, 22 BRBS 403, 407 (1989); *Stevens v. Lockheed Shipbuilding Co.*, 22 BRBS 155, 157 (1989). The traditional approach for determining whether an injury is permanent or temporary is to ascertain the date of maximum medical improvement (MMI).

The determination of when MMI is reached, so that a claimant's disability may be said to be permanent, is primarily a question of fact based on medical evidence. *Hite v. Dresser Guiberson Pumping*, 22 BRBS 87, 91 (1989). *Care v. Washington Metro Area Transit Authority*, 21 BRBS 248 (1988). An employee is considered permanently disabled if he has any residual disability after reaching MMI. *Lozada v. General Dynamics Corp.*, 903 F.2d 168 (2d Cir. 1990); *Sinclair v. United Food &*

*Commercial Workers*, 13 BRBS 148 (1989); *Trask v. Lockheed Shipbuilding & Construction Co.*, 17 BRBS 56 (1985). A condition is permanent if a claimant is no longer undergoing treatment with a view towards improving his condition, *Leech v. Service Engineering Co.*, 15 BRBS 18 (1982), or if his condition has stabilized. *Lusby v. Washington Metropolitan Area Transit Authority*, 13 BRBS 446 (1981).

**C(1) Nature of Claimant's Injury**

On December 4,1998, Dr. Lombardo diagnosed a contusion to Claimant's left shoulder/scapula region, and after x-rays were negative, he opined that Claimant may attempt to return to work on the following day. (EX 4, p. 1). On December 11, 1998, Dr. Laborde noted a slight pointing of the AC joint consistent with the aging process in Claimant's shoulder. (CX 7, p. 32). When Claimant continued to complain of pain on December 28, 1998, such that he could only work three days a week, Dr. Laborde recommended an MRI. *Id*. at 30. On January 11, 1999, Dr. Laborde noted that the MRI only showed AC arthritis, but Dr. Laborde advised Claimant to discontinue physical therapy and remain off from work for two weeks to see if his pain decreased. *Id*. at 29. By March 18, 1999, Dr. Laborde counseled Claimant about undergoing a surgical resection of the distal clavical which may address his pain, but it would also weaken his shoulder. *Id*. at 24. X-rays taken on June 14, 1999, revealed some degenerative arthritis with some absorption of the distal clavical. *Id*. at 22. When Claimant's condition degenerated to a point where he could no longer climb ladders at work, Dr. Laborde performed shoulder surgery on August 18, 1999. *Id*. at 19. Claimant's final diagnosis was acromioclavicular arthritis with a superimposed injury or contusion, persistent pain, a surgical resection of the distal clavical with acromioplasty with resulting pain and weakness. (CX 2, p. 28).

On March 23, 2000, Dr. Phillips questioned whether there was a periosteal overgrowth of new bone which was impinging on the old clavicular joint. (CX 6, p. 3-4). Claimant had absent biceps reflex and numbness in his thumb, which were both indications of a problems with the C5 nerve root. *Id*. at 4. The manner in which Claimant sustained his injury also suggested that he may have sustained a forced flexion/rotation stress to his neck. *Id*. Alternatively, Claimant may have an incomplete excision or regrowth of bone into the acromioclavicalar joint. *Id*. An MRI of the right shoulder taken on November 11, 2000 revealed that there was an irregular appearance of the shoulder joint with a low signal structure which suggested a spur or metallic artifact, which suggested impingement of the supraspinatus tendon. *Id*. at 14-15. An MRI of the left shoulder performed on the same day appeared identical to the right shoulder. *Id*. at 16-17.

An X-ray of Claimant's cervical spine taken on June 14, 2001, demonstrated a cervical spasm and a degenerated fifth cervical disc. (CX 6, p. 25). In a computed tomography of Claimant's left shoulder, dated August 16, 2001, Claimant was noted to have an irregular spur-like complex extending from the acromion process of the scapula, which possibly represented a post-traumatic change. (CX 6, p. 29). On August 29, 2002, Dr. Phillips remarked that Claimant's cervical x-ray demonstrated spondylosis at C5. *Id*. at 32. Dr. Phillips testified that the spur that had regrown after Claimant's shoulder surgery was the cause of his problems. (CX 3, p. 11). Because Claimant only

suffered intermittent moderate pain from his shoulder, Dr. Phillips did not recommend any further surgery to remove the spur. *Id*. at 17-18. After Dr. Phillips retired in January, 2003, Claimant began treatment with Dr. Watermeier at the same office. (CX 6, p. 33-34). On January 15, 2003, Dr. Watermeier discharged Claimant and he diagnosed Claimant as having shoulder impingement syndrome and bursitis. *Id*. at 34.

As discussed, *supra* Part IV B, I do not find that Claimant's cervical complaints are related to his work-place accident. Accordingly, I find that the nature of Clamant's December 4, 1998 workplace injury is: acromioclavicular arthritis with a superimposed injury or contusion, persistent pain, a surgical resection of the distal clavical with acromioplasty and resulting weakness, a possible periosteal overgrowth of new bone which was impinging on the old clavicular joint/incomplete excision or regrowth of bone into the acromioclavicalar joint, a post-traumatic spur complex that produced intermittent pain, and bursitis.

**C(2) Extent of Claimant's December 4, 1998 Workplace Injury**

On December 4,1998, Dr. Lombardo examined Claimant following his workplace accident and he opined that Claimant could return to work on the following day without restrictions. (EX 4, p. 1). On December 11, 1998, Dr. Laborde opined that Claimant's shoulder injury did not necessitate surgery. (CX 7, p. 32). On December 28, 1998, Claimant complained that he could only work three days a week due to persistent pain. *Id*. at 30. On January 11, 1999, Dr. Laborde advised Claimant to discontinue physical therapy and remain off from work for two weeks to see if his pain decreased. *Id*. at 29. When Claimant returned on January 25, 1999, he continued to complain of shoulder pain, but he had a full range of motion in the shoulder. *Id*. at 28. After administering an injection, Dr. Laborde opined that Claimant could return to work without restriction on February 1, 1999. *Id*. at 28.

After a week of working without restrictions, Claimant returned to Dr. Laborde on February 8, 1999, complaining of continued pain. (CX 7, p. 26). By August 3, 1999, Claimant consented to have surgery after he could no longer climb ladders at work. (CX 7, p. 20). By September 30, 1999, Dr. Laborde instructed Claimant to discontinue use of his sling and to begin a work hardening program, but because Employer did not have a light duty position for him, Claimant reported that he could not return to work. *Id*. at 16.

By December 2, 1999, Claimant reported that he could lift up to thirty pounds, but his pain increased with any additional weight. (CX 7, p. 10). Claimant did not feel capable of returning to his former employment and his work hardening therapy notes indicated that he was making limited progress. *Id*. Dr. Laborde advised that Claimant was going to either work in pain or change to some lighter work with a fifty pound lifting restriction. *Id*. On December 22, 1999, Dr. Laborde opined that a better course of action was to engage Claimant in vocational rehabilitation with restrictions of no lifting over fifty pounds and no climbing rung type ladders. *Id*. Dr. Laborde also stated that he would further restrict Claimant from prolonged periods of overhead work. (CX 2, p. 27, 33).

Based on Claimant's shoulder injury, Dr. Laborde assigned Claimant a twenty-five to forty percent impairment to his shoulder, which translated to a six to ten percent impairment to Claimant's arm, which was a permanent disability. (Tr. 16).

On March 23, 2000, Dr. Phillips recommended a cervical MRI and an MRI of the shoulder as well as plain x-rays of the neck, an electromyogram and nerve conduction studies in both upper extremities. (CX 6, p. 4). *Id*. When the testing was not approved by April 20, 2000, Dr. Phillips opined that Claimant was not able to return to work. *Id*. at 9. On November 6, 2000, Dr. Phillips reiterated that Claimant remained disabled while awaiting a cervical MRI. *Id*. at 19.

On June 14, 2001, Dr. Gains restricted Claimant to avoiding repetitive crawling due to his left shoulder limitations, and she recommended that Claimant not lift over ten to fifteen pounds with his left upper extremity and that any lifting should be limited below his shoulder level. (CX 6, p. 28). On April 9, 2002, Dr. Phillips lamented that no cervical testing had been approved, and he opined that in the absence of a cervical work-up, Claimant would remain symptomatic as well as totally and permanently disabled. *Id*. at 30. On August 29, 2002, Dr. Phillips remarked that Claimant's cervical x-ray demonstrated spondylosis at C5 and he continued Claimant's permanent and total disability status. *Id*. at 32. After Dr. Phillips retired in January, 2003, Dr. Watermeier, who took over Claimant's care from Dr. Phillips, discharged Claimant stating that Claimant could return to light duty work. *Id*. at 34.

Because I find that Claimant's neck complaints are not causally related to his workplace accident, I do not credit the reports of Dr. Phillips that Claimant was totally and permanently disabled because of his workplace injury. While Dr. Watermeier related that Claimant could return to work at light duty, and Dr. Gains opined that Claimant could return to work if a job did not require repetitive crawling or lifting above ten to fifteen pounds, I credit the reports of Dr. Laborde, that Claimant could engage in medium type work, over Dr. Gains and Watermeier because Dr. Laborde treated Claimant over a long period of time, his restrictions were consistent with Claimant's demonstrated abilities after completing a lengthy work hardening program, they are more consistent with Claimant's stated ability to lift greater than fifteen pounds, and he correctly assessed that Claimant's neck injury, if any, was not related to his workplace accident. Accordingly, I find that pursuant to Dr. Laborde's recommendations, the extent of Claimant's injury is such that Claimant cannot lift over fifty pounds, cannot climb rung type ladders, and Claimant should avoid prolonged overhead work.

**C(3) Date of Maximum Medical Improvement**

Claimant underwent shoulder surgery with Dr. Laborde on August 18, 1999. (CX 7, p. 19). By December 2, 1999, Claimant reported that he could lift up to thirty pounds, but his pain increased with any additional weight. (CX 7, p. 10). Claimant did not feel capable of returning to his former employment and his work hardening therapy notes indicated that he was making limited progress. *Id*. Dr. Laborde advised that Claimant was going to either work in pain or change to some lighter work with a fifty pound lifting restriction. *Id*. On December 22, 1999, Dr. Laborde noted that Claimant

would not be able to reach the one-hundred pound lifting requirement to engage in heavy work. *Id*. at 9. Dr. Laborde opined that a better course of action was to engage Claimant in vocational rehabilitation with restrictions of no lifting over fifty pounds and no climbing rung type ladders. *Id*. On February 2, 2000, Dr. Laborde opined that Claimant had reached maximum medical improvement and he reiterated his restrictions. *Id*. at 7. On further reflection, Dr. Laborde stated that Claimant's actual date of maximum medical improvement was his December 22, 1999 examination, and Dr. Laborde also stated that he would further restrict Claimant from prolonged periods of overhead work. (CX 2, p. 27, 33). At the formal hearing, Dr. Laborde testified that Claimant reached maximum medical improvement on November 20, 1999, three months after his shoulder surgery. (Tr. 12).

After Dr. Phillips retired in January, 2003, Claimant began treatment with Dr. Watermeier at the same office. (CX 6, p. 33-34). On January 15, 2003, Dr. Watermeier discharged Claimant as he had reached MMI for his shoulder treatments. *Id*. at 34. Dr. Watermeier stated that Claimant could see a pain management physician for medication as necessary, and he released Claimant to light duty work. *Id*.

I do not credit Dr. Laborde's statement that Claimant reached maximum medical improvement on November 20, 1999, because at that time, Claimant was still undergoing a work hardening program. (CX 7, p. 10). By December 22, 1999, Dr. Laborde had set permanent work restrictions for Claimant, he noted that Claimant had finished his work hardening program, and he released Claimant to return only as needed. (CX 7, p. 9). No further treatment for Claimant's condition was indicated in either Dr. Laborde's January 18, 2000 or February 2, 2000 reports. As noted *supra*, Part IV B, I do not find that Claimant's neck injury, if any, is related to his workplace accident and thus, I do not credit the reports of Dr. Phillips. Accordingly, I find that Claimant reached maximum medical improvement for his December 4, 1998 workplace injury on December 22, 1999.

**D. Reasonableness and Necessity of Cervical Testing**

Section 7(a) of the Act provides that "the employer shall furnish such medical, surgical, and other attendance or treatment . . . for such period as the nature of the injury or the process of recovery may require." 33 U.S.C. § 907(a) (2002). The Board has interpreted this provision to require an employer to pay all reasonable and necessary medical expenses arising from a workplace injury. *Dupre v. Cape Romaine Contractors, Inc.*, 23 BRBS 86 (1989). Under the Administrative Procedures Act, the claimant bears the ultimate burden of persuasion by a preponderance of the evidence that medical treatment is reasonable and necessary. *Director, OWCP v. Greenwich Collieries*, 114 S. Ct. 2251, 2259, 512 U.S. 267, 281, 129 L. Ed. 2d 221 (1994). In this case, Dr. Phillips recommended diagnostic testing of Claimant's cervical spine which was not approved by Carrier. Because I find that Claimant did not suffer a neck injury in his December 4, 1998 workplace accident, diagnostic testing of Claimant's cervical spine is not reasonable or necessary treatment for his workplace accident.

## E. Residual Wage Earning Capacity

### E(1) *Prima Facie* Case of Total Disability

The Act does not provide standards to distinguish between classifications or degrees of disability. Case law has established that in order to establish a *prima facie* case of total disability under the Act, a claimant must establish that he can no longer perform his former longshore job due to his job-related injury. *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1038 (5th Cir. 1981); *P&M Crane Co. v. Hayes*, 930 F.2d 424, 429-30 (5th Cir. 1991); *SGS Control Serv. v. Director, Office of Worker's Comp. Programs*, 86 F.3d 438, 444 (5th Cir. 1996). He need not establish that he cannot return to *any* employment, only that he cannot return to his former employment. *Elliot v. C&P Telephone Co.*, 16 BRBS 89 (1984). The same standard applies whether the claim is for temporary or permanent total disability. If a claimant meets this burden, he is presumed to be totally disabled. *Walker v. Sun Shipbuilding & Dry Dock Co.*, 19 BRBS 171 (1986). Here, Claimant's former job required a heavy level of physical exertion, and following surgery performed by Dr. Laborde in August, 1999, Claimant was limited to medium level work. Accordingly, Claimant established a *prima facie* case of total disability after August, 1999, because he was unable to resume his former job due to a work related injury.

### E(2) Claimant's Post-Injury Wages Earned in Employer's Facility

"An award of total disability while a claimant is working is the exception and not the rule." *Carter v. General Elevator Co.*, 14 BRBS 90, 97 (1981). *See also Everett v. Newport News Shipbuilding & Dry Dock Co.*, 23 BRBS 316 (1989); *Jordan v. Bethlehem Steel Corp.*, 19 BRBS 82 (1986). Thus, injured employees working in pain or in sheltered employment may still receive total disability even though they continue to work. *See Harrod v. Newport News Shipbuilding & Dry Dock Co.*, 12 BRBS 10 (1980) (sheltered employment); *Shoemaker v. Schiavone & Sons Inc.*, 11 BRBS 33, 37 (1979) (extraordinary effort); *Walker v. Pacific Architects & Engineers*, 1 BRBS 145, 147-48 (1974) (beneficent employer). If the claimant is performing satisfactorily and for pay, then barring other signs of beneficence or extraordinary effort, the work precludes an award for total disability. *Harrison v. Todd Pacific Shipyards Corp.*, 21 BRBS 334 (1981).

In this case, Claimant returned to his former job following his December 4, 1998 workplace injury, at the same rate of pay, earning substantially the same as he did prior to his injury. (EX 3, p.1). Because Claimant was able to perform his former job satisfactorily, and for pay from December 5, 1998 to January 11, 1999, and from January 31, 1999 to August 2, 1999, I find that Claimant suffered no loss of wage earning capacity for that time period. On August 2, 1999, Claimant informed Dr. Laborde that his pain was such that he could no longer climb ladders at work. (CX 7, p. 20). Thus, I do not find that wages earned by Claimant between August 2, 1999 and the date of his surgery on August 18, 1999, constitutes suitable alternative employment because, Claimant was working in pain which was significant enough to request surgery. Accordingly, Claimant had no loss of wage earning capacity from December 5, 1998 to January 11, 1999, and from January 31, 1999 to August 2, 1999, after which time Claimant presented a *prima facie* case of total disability.

**E(3) Post-Injury Wage Earning Capacity - Employee Working**

In determining a claimant's wage earning capacity, Section 8(h) provides that claimant's earning capacity shall be his actual post-injury earnings if these earnings fairly and reasonably represent his true earning capacity. 33 U.S.C. § 908(h) (2003). Section 8(h) provides a two-step process to determine post-injury wage earning capacity. First, one must consider whether a claimant's post-injury wages accurately reflect actual wage earning capacity. If so, then the second step need not be reached. *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984). If not, then one must consider the claimant's actual capacity for gainful employment. *Walsh v. Northfolk Dredging Co.*, 878 F.2d 380, 1989 WL 68806 (4th Cir. 1989)(Table). Where a claimant's post-injury employment is short lived, it does not constitute realistic and regular work available to a claimant in the open market, and as such does not truly reflect a claimant's post-injury wage earning capacity. *Newport News Shipbuilding and Dry Dock Co. v. Stallings*, 250 F.3d 868, 872 (4th Cir. 2001) (finding that actual wages were not representative of wage earning capacity because of amount of overtime worked). The Board has elicited some factors for consideration for each level of inquiry:

> The concept of a loss of wage-earning capacity encompasses more than a mere comparison of wages before and after an injury. Such factors as the beneficences [sic] of a sympathetic employer, the claimant's earning power on the open market, whether the claimant is required to expend more time, effort or expertise to achieve pre-injury production, and whether the claimant can perform his pre-injury physical work must all be taken into consideration. In addition, loss of wage-earning capacity is also a forward looking concept which is to be applied in cases where medical and other circumstances indicate a probable work injury related wage loss in the future. The relatively short (one year) statute of limitations requires such a perspective.

*Beck v. Newport News Shipbuilding and Dry Dock Co.*, 33 BRBS 543, 545 (1999)(citing *Randall v. Comfort Control, Inc.*, 725 F.2d 791, 797 (D.C. Cir. 1984)(quoting *Hughes v. Litton Systems, Inc.*, 6 BRBS 301, 304 (1977)).

Beginning on June 6, 2000, Claimant earned $5.35 pr hour on a part-time basis taking care of his disabled nephew. (Tr. 99-100; CX 24). Claimant held that job until February 12, 2003, when his nephew turned twenty-one years of age. (Tr. 99-100). Claimant testified that he could have performed that job on a forty-hour a week basis and the parties stipulated that the job established a minimum wage earning capacity for Claimant beginning on June 6, 2000. (Tr. 40-41). Also, just prior to the formal hearing, Claimant obtained a job with Bayou State Security on a full time basis earning no less than $6.50 per hour. (Tr. 96). No evidence was presented that Claimant was not able to physically perform these jobs or that such jobs are the product of sheltered employment or a beneficent employer. Rather, the only issue is whether his earnings of $5.35 per hour and $6.50 per hour accurately reflect his wage earning capacity in the open market. Inasmuch as Claimant admitted

he was voluntarily underemployed taking care of his nephew,[2] and Dr. Laborde had released Claimant to return to medium level work, I find that Claimant's actual post-injury wages are not an accurate reflection of his wage earning capacity.[3]

**E(3)(a) Claimant's Wage Earning Capacity in the Open Market**

The Fifth Circuit has articulated the burden of the employer to show suitable alternative employment as follows:

> Job availability should incorporate the answer to two questions. (1) Considering claimant's age, background, etc.., what can the claimant physically and mentally do following his injury, that is, what types of jobs is he capable of performing or capable of being trained
> to do? (2) Within this category of jobs that the claimant is reasonably capable of performing, are there jobs reasonably available in the community for which the claimant is able to compete and which he could realistically and likely secure? . . . This brings into play a complementary burden that the claimant must bear, that of establishing reasonable diligence in attempting to secure some type of alternative employment within the compass of employment opportunities shown by the employer to be reasonably attainable and available.

*Turner*, 661 F.2d at 1042-43 (footnotes omitted).

**E(3)(b) Claimant's Age Background, Experience, and Physical Limitations**

Claimant was born in 1949, he has a high school education, was able to drive, and had been working on the waterfront since 1968. (CX 5, p. 1; EX 7, p. 1). Claimant worked primarily as a lasher and holdman, he occasionally operated forklifts, but he did not operate winches or cranes because he did not like heights. (EX 7, p. 1). In vocational testing, Claimant demonstrated academic abilities at the 6.7 grade level in letter word identification, 11.0 grade level in passage comprehension, 6.2 grade level in calculation, and 9.4 grade level in applied problems. *Id*. at 3. As a result of his December 4, 1998 workplace injury, Claimant suffers from acromioclavicular arthritis with a superimposed injury or contusion, persistent pain, a surgical resection of the distal clavical with acromioplasty and resulting weakness, a possible periosteal overgrowth of new bone which was impinging on the old clavicular joint/incomplete excision or regrowth of bone into the acromioclavicalar joint, a post-traumatic spur complex that produced intermittent pain, and bursitis. Based on the nature of his

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[2] At that time, Claimant was receiving $711.98 per week in compensation, and Claimant testified that he undertook the job, in part, to help out his sister. (Tr. 100-01).

[3] Whether Claimant's wages with Bayou State Security represents underemployment is discussed *infra*, Part IV, Section E(3)(d).

workplace injury, Dr. Laborde limited Claimant to no lifting over fifty pounds, no climbing rung type ladders, and Claimant should avoid prolonged overhead work. Apart from his December 4, 1998 workplace injury, Claimant also sustained a 1971 leg injury, which resulted in a thirty percent impairment to Claimant's ankle, or a seven to ten percent impairment of Claimant's leg. Claimant also had a five percent whole body impairment from spondylolisthesis that was present in 1971. Finally, Claimant had a three percent permanent impairment to his eye as a result of a 1987 injury. Despite all of Claimant's pre-existing permanent impairments, he was able to engage in heavy work until he consented to have surgery on August 2, 1999.

**E(3)(b) Jobs in Claimant's Community**

Employer's vocational counselor identified several jobs on March 16, 2000, as outlined *supra*, Part III, Section C(7). I find that all of the jobs Ms. Favaloro identified, with the exception of a forklift operator, fit within Claimant's work limitation set by Dr. Laborde. Mr. Ryan opined that Claimant could not perform the job as a forklift operator because it required the use of all four extremities. (Tr. 188). While Claimant had no medical restrictions prohibiting him for using his left arm, Dr. Laborde did not unconditionally approve the job as a forklift operator for Claimant, rather, he stated that it was possible that Claimant could perform the job and he was not certain that the job was unsuitable. (Tr. 188; CX 7, p. 3-4). Claimant testified that he had driven a forklift in the past, but he had never operated one. (Tr. 119). Also, Claimant testified that objects exceeding his lifting limitation sometimes fell off the forklift which necessitated picking them back up. (Tr. 121). Based on the testimony of Claimant and Mr. Ryan, as well as the statement by Dr. Laborde that it was only possible Claimant could operate a forklift, I do not find the job identified by Ms. Favaloro as a forklift operator is suitable for Claimant.

Although Claimant had a three percent permanent impairment to his eye, I do not find that such a small impairment is a barrier to Claimant's securing a position as a surveillance observer, considering the fact that Claimant was not even aware he had a permanent impairment to his eye on the day of the formal hearing. Also, while nothing in Claimant's background suggested to Mr. Ryan that Claimant had the aptitude to be a salesman, to design kitchens, or to use a computer, I find no impairment that would prohibit Claimant from competing for, and obtaining, such a position. (Tr. 196). The fact that Claimant applied for a job at Home Depot in 2003 and had not been hired concerns Claimant's diligence and not his ability to realistically secure such a position. As Mr. Ryan testified, the job as a toll collector was a non-competitive position, thus, I find no barrier to Claimant's capacity to realistically and likely secure that position. (CX 5, p. 2). Likewise, I find no barrier to Claimant realistically and likely securing a job as a security representative, as further indicated by Claimant's recent employment by Bayou State Security. Therefore, I find that all of the jobs, with the exception of a forklift operator, identified by Ms. Favaloro fall within Claimant's physical restrictions and that those positions represent opportunities in the open market that Claimant could realistically and likely secure.

In determining a claimant's earning capacity for suitable alternative employment, the Board has indicated that it is proper to take an average pay of all the jobs reasonably available. *Louisiana*

*Insurance Guaranty. Ass'n v. Abbott*, 40 F.3d 122, 129 (5th Cir.1994) (finding that averaging salary figures to establish earning capacity was appropriate and reasonable). Averaging the starting pay for the jobs Ms. Favaloro identified results in an average hourly pay of $8.06,[4] for an average weekly wage of $322.40. (Security Representative - $7.75; Sales, Kitchen Cabinet Department - $7.00; Surveillance Observer - $10.00; Toll Collector - $7.50).

**E(3)(d) Diligence**

A claimant may rebut evidence of suitable alternative employment if he demonstrates that he diligently searched for a job but was unable to obtain a position. *Ceres Marine Terminal v. Hinton*, 243 F.3d 222 (5th Cir. 2001); *New Orleans (Gulfwide) Stevedores v. Turner*, 661 F.2d 1031, 1040 (5th Cir, 1981). A diligent job search "involves an industrious, assiduous effort to find a job by one who conveys an impression to potential employers that he really wants to work." *Livingston v. Jacksonville Shipyards, Inc.*, 33 BRBS 524, 526 (ALJ). The claimant need not prove that he was turned down for the exact jobs that the employer showed were available, but must demonstrate diligence in attempting to secure a job within the compass of opportunities that the employer reasonably showed were available. *Palombo v. Director, OWCP*, 937 F.2d 70, 74 (2nd Cir. 1991).

Here, Claimant testified that he applied for positions within the compass of opportunities identified by Ms. Favaloro. (Tr. 92-114). Specifically, Claimant applied for jobs as a security representative (Merchant Security, Weiser Security, Major Thibodeaux, Bayou State Security, Vinson Guard Service, Alamo Security Service), surveillance jobs (Harrah's Casino, Boomtown Casino, Treasure Chest Casino), a salesman in the kitchen and bath department (Home Depot); as a toll booth operator (Crescent City Connection); as a service agent (Budget Rent-a-Car, National Rent-a-Car); and as a driver (Budget Rent-a-Car, National Rent-a-Car). (CX 13-23). While Ms. Favaloro's original Labor Market Survey was dated April 17, 2000, Claimant did not apply for the majority of his jobs until shortly before the formal hearing. Accordingly, I find that Claimant did not conduct a diligent job search while he was voluntarily underemployed taking care of his nephew.

More indicative of Claimant's post-injury earning capacity in April, 2003, is evidenced by his employment with Bayou State Security. When Claimant obtained that job prior to the formal hearing, he was no longer employed taking care of his nephew, Carrier had terminated his wage

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[4] The hourly wages of these positions was contested by Dr. Ryan who stated that the job as a toll collector paid $6.31 per hour, and security positions generally paid between $5.50 and $7.00 per hour. (CX 5, p. 2). In her deposition, Ms. Favaloro reiterated that last time she checked the position as a toll collector paid $7.50 per hour, and the security position paying $7.75 per hour was with Hertz-Rent-A-Car. As these represent specific jobs available to Claimant based on his age, background and physical limitations, I find no reason to depart from the wage figures used by Ms. Favaloro over the general wage rates testified to by Mr. Ryan. Claimant testified that the toll collector position paid $6.00 per hour, but Claimant is not a vocational expert, he was never offered that job, and such testimony is self-serving.

compensation checks following a federal district court judgment awarding damages that was subsequently appealed, and Claimant was faced, for the first time, life without a regular paycheck. Faced with an immediate need for a job, Claimant sought and obtained employment at a minimum starting pay of $6.50 per hour at the date of the formal hearing. While the specific employers Ms. Favaloro researched to prepare her report may pay higher wages, Claimant's wage rate at Bayou State Security is representative of the average hourly wages available for such work as identified by Mr. Ryan, and it falls within the compass of opportunities listed by Ms. Favaloro in her supplemental report dated January 6, 2003. Claimant submitted numerous employment applications in the month proceeding the formal hearing. I find that Claimant did engage in a diligent job search in early 2003, and as a result of a diligent search, Claimant obtained a job paying a average weekly wage of $260.00 per week as of April 24, 2003.[5]

Thus, I find that Claimant was voluntarily underemployed when he began his job care-taking for his nephew, and Employer established suitable alternative employment reflecting a wage earning capacity of $322.40 per week on April 17, 2000. On April 24, 2003, Claimant's wage earning capacity decreased to $260.00 per week. As of April 17, 2000, Claimant's disability changed from total to partial under Section 8(c)(21) of the Act. 33 U.S.C. § 908(c)(21)(2003). Under that provision, Claimant's compensation rate is set as two-thirds of the difference between the average weekly wages of the employee before the injury and the employee's wage earning capacity after the injury. *Id*. Before calculating those benefits, however, Claimant's earning capacity in the alternative employment must be adjusted to account for any wage inflation between the date of injury and the date suitable alternative employment became available. *Sestich v. Long Beach Container Terminal*, 289 F.3d 1157 (9th Cir. 2002) (stating the Act contemplates the current dollar amount of wage earning capacity be adjusted back in time to account for post-injury inflation and general wage increases); *LaFaille v. Benefits Review Diard, U.S. Department of Labor,* 884 F.2d 54 (2nd Cir. 1989) (requiring Board to express its finding "of the residual wage earning capacity in terms of the time-of-injury equivalent of the residual earnings, since general wage increases and inflation would otherwise distort the comparison required under § 8(c)(21)"); *Walker v. Washington Metropolitan Area Transit Authority,* 793 F.2d 319, 321 (D.C. Cir. 1986)*; Bethard v. Sun Shipbuilding & Dry Dock Co.,* 12 BRBS 691, 695 (1980). If there is no evidence of the earning potential of the particular job at the time of a claimant's injury, the necessary adjustment may be made by decreasing the claimant's earnings by the increases in the National Average Weekly Wage since the date of the injury. *Richardson v. General Dynamics Corp.,* 23 BRBS 327 (1990).

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[5] This represents a loss of wage earning capacity from April 17, 2000, when Ms. Favaloro identified suitable jobs averaging $8.06 per hour. Had Claimant engaged in a diligent job search at that time, he may have been able to establish a lower wage earning capacity. Regarding the decrease in Claimant's wage earing capacity from 2000 to 2003, I only note that a worker's wages do not necessarily increase over time, the $6.50 per hour Claimant earns as a security guard is reflective of what a willing employer will pay a willing worker, and for Section 8(h) purposes, I find that $6.50 per hour accurately reflects Claimant's wage earning capacity following a diligent job search within the compass of opportunities presented by Employer.

The National Average Weekly Wage for the period covering December 4, 1998 was $435.88. *See* U.S. Department of Labor, Employment Standards Administration, Division of Longshore and Harbor Workers' Compensation, *National Average Weekly Wages (NAWW), Minimum and Maximum Compensation Rates, and Annual October Increases (Section 19(f)), at* http://www.dol.gov/esa (visited January 29, 2003). The National Average Weekly Wage for the period covering April 17, 2000 was $450.64. This represents a 3.39% increase over the National Average Weekly Wage on December 4, 1998. (450.64 - 435.88 = 14.76. 14.76 ÷ 435.88 = 0.339). Thus, adjusting the $8.06 per hour, or $322.40 per week, Claimant had the capacity to earn on April 17, 2000, in December 4, 1998 wages, a weekly wage rate of $310.30. (310.30 + 310.30(.039) = 322.40). The National Average Weekly Wage on April 24, 2003 was $498.27. *Id*. This represents a 14.31% increase over the National Average Weekly Wage on December 4, 1998. (498.27 - 435.88 = 62.39. 62.39 ÷ 435.88 = 14.31%). Thus, adjusting the $6.50 per hour, or $260.00 per week, Claimant had the capacity to earn on April 24, 2003, in December 4, 1998 wages, a weekly wage rate of $227.45. (227.45 + 227.45(.1431) = 260.00).

**F. Entitlement to Benefits**

Immediately following Claimant's December 4, 1998 injury, Claimant did not lose more than three days of work due to his injury. *See* 33 U.S.C. § 906(a) (2003) (stating that no compensation is due for the first three days of disability unless the disability lasts longer than fourteen days, in which case compensation is due from the first day of disability). Instead, Claimant resumed his former longshore job and did not suffer any discernable loss of wage earning capacity due to his injury. Claimant did become disabled due to his work place injury on January 11, 1999, pursuant to Dr. Laborde's recommendations, and that disability lasted through January 31, 1999, during which time Claimant was temporarily totally disabled, entitled to weekly compensation at the maximum rate of $871.76. Beginning on February 1, 1999, Claimant was again able to resume his former longshore job without a discernable loss of wage earning capacity. On August 2, 1999, however, Claimant complained to Dr. Laborde that he was no longer able to perform his regular job duties due to significant pain, and Claimant consented to have shoulder surgery. Thus, from August 2, 1999 to December 22, 1999, the day Claimant reached maximum medical improvement, Claimant was temporarily totally disabled, entitled to the maximum compensation rate of $871.76. Because Claimant was not able to resume his former job on the date he reached maximum medical improvement, Claimant was totally and permanently disabled until Employer established suitable alternative employment on April 17, 2000. From December 22, 1999 to April 17, 2000, Claimant was entitled to permanent total disability payments at the maximum rate of $871.76 per week, adjusted under Section 10(f) of the Act. 33 U.S.C. 910(f) (2003). On April 17, 2000, Claimant became permanently partially disabled with a residual wage earning capacity of $310.30 per week. Under Sections 8(c)(21), Claimant is entitled to permanent partial disability payments from April 17, 2000 to April 23, 2003, in the amount of $722.45 per week. (1,393.97 - 310.30 = 1,083.67. 1,083.67 (2/3) = 722.45). 33 U.S.C. § 908(c)(21) (2003). From April 24, 2003 and continuing, Claimant is entitled to permanent partial disability payments in the amount of $777.68. (1,393.97 - 227.45 = 1,166.52 (2/3) = 777.68).

**G. Suspension of Compensation Pending Appeal of Third-Party Judgment**

In third-party litigation, Claimant won $472,000.00 against Yangming Marine Transport, plus prejudgment interest on the amount of $211,220.00, which represented pain and suffering, past lost earnings, and medical expenses. *Keys v. M/V MING LONGEVITY*, No. 01-2447 (E.D. La. February 11, 2003). $260,780.00 of Claimant's judgment represented lost future earnings. *Id*. The defendant, Yangming Marine Transport Co., appealed that judgment to the Fifth Circuit Court of Appeals on March14, 2003. On March 26, 2003, Claimant also filed an appeal. Employer filed an appeal on March 28, 2003. Employer terminated Claimant's compensation benefits on January 23, 2003, pursuant to the federal court judgment.[6]

Under Section 33(f), an Employer is only required to pay compensation if the net amount of a third-party recovery is less than Employer's compensation liability. 33 U.S.C. § 933(f) (2003). By its express terms, a Section 33(f) credit is limited to the amount of a claimant's recovery. 33 U.S.C. § 933(f) (2003) (stating that the credit is taken against "the net amount recovered against such third person."); *Nacirema Operating Co. v. Oosting*, 456 F.2d 956 (4th Cir. 1972); *Luke v. Petro-Weld, Inc.*, 14 BRBS 269 (1981). A federal circuit court has jurisdiction over all final decisions of U.S. district courts. 28 U.S.C. § 1291 (2003). Under Fed. R. Civ. P. 62(d) (2003), when an appeal from a final money judgment is taken to the court of appeals, the final judgment is stayed when the appellant posts a supersedeas bond. A stay of a final money judgement is a matter of right with the posting of a supersedeas bond. *American Mfrs. Mut. Ins. Co. v. American Broadcasting-Paramount Theaters, Inc.*, 87 S. Ct. 1, 17 L. Ed. 2d 37 (1966). Accordingly, I find that because Claimant's money judgement from the district court was stayed by the defendant when it posted a supersedeas bond, Claimant's net recovery remains zero, and there is no sum of money for which Employer can take a credit.

**H. Section 8(f) Relief**

Section 8(f) shifts a portion of the liability for permanent partial and permanent total disability from the employer to the Special Fund established by Section 44 of the Act, when the disability was not due solely to the injury which is the subject of the claim. Section 8(f) is, therefore, invoked in situations where the work-related injury combines with a pre-existing partial disability to result in a greater permanent disability than would have been caused by the injury alone. *Lockheed Shipbuilding v. Director, OWCP*, 951 F.2d 1143, 1144 (9th Cir. 1991). Relief is not available for temporary

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[6] Employer argued that because Claimant had not submitted this issue to the district director, it should not be determined by this Court. I note that this is a matter of law, there is no factual dispute, and remanding the case to the district director for consideration of this issue would result in needless delay. Furthermore, the parties had a full opportunity to brief the legal ramifications of the issue following the formal hearing considering that no discovery was needed. *See* 29 C.F.R. § 702.336(a) (2001).

disability, no matter how severe. *Jenkins v. Kaiser Aluminum & Chemical Sales*, 17 BRBS 183, 187 (1985). Most frequently, where Section 8(f) is applicable, it works to effectively limit the employer's liability to 104 weeks of compensation. Thereafter, the Special Fund makes the compensation payments.

Section 8(f) relief is available to an employer if three requirements are established: (1) that the claimant had a pre-existing permanent disability; (2) that his partial disability was manifest to the employer; and (3) that it rendered the second injury more serious than it otherwise would have been. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990), *rev'g* 16 BRBS 231 (1984), 22 BRBS 280 (1989). In cases of permanent partial disability the employer must also show that the claimant sustained a new injury, *Jacksonville Shipyards v. Director, OWCP*, 851 F.2d 1314, 1316-17 (11th Cir. 1988) (en banc), and the current disability must be materially and substantially greater than that which would have resulted from the new injury alone. *Louis Dreyfus Corp. v. Director, OWCP*, 125 F.3d 884 (5th Cir. 1997); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir.1997). It is the employer's burden to establish the fulfillment of each of the above elements. *See Peterson v. Colombia Marine Lines*, 21 BRBS 299, 304 (1988); *Stokes v. Jacksonville Shipyards*, 18 BRBS 237 (1986).

**H(1) Claimant's Pre-Existing Permanent Partial Disability**

Claimant suffered a from three injuries prior to his December 4, 1998 workplace accident, which resulted in the following impairments:

1. A 1971 leg injury which resulted in a twenty to thirty percent permanent impairment to Claimant's ankle, or a six to ten percent impairment to the leg;

2. A 1971 diagnosis of spondylolisthesis that resulted in a five percent permanent whole body impairment;

3. A 1987 eye injury resulting in a three percent permanent impairment to the eye.

(Tr. 16-20; EX 9, 10, 13).

**H(2) Partial Disability Manifested to Employer**

To show entitlement to Section 8(f) relief, the employer must demonstrated the pre-existing permanent impairments were manifested to the employer. *Director, OWCP v. Berkstresser*, 921 F.2d 306, 309 (D.C. Cir. 1990). To meet this requirement, the employer must have actual knowledge of the pre-existing condition, or there must be medical records in existence from which the condition was objectively determinable. *Wiggins v. Newport News Shipbuilding & Dry Dock Co.*, 31 BRBS 142, 147 (1997), citing *Esposito v. Bay Container Repair Co.*, 30 BRBS 67 (1996). Medical records need not indicate the severity of precise nature of the pre-existing conditions, and the medical records

will satisfy the "manifest" requirement if they contain "sufficient and unambiguous information regarding the existence of a serious lasting physical problem." *Id.* (Citing *Director, OWCP v. General Dynamics Corp.*, 980 F.2d 74 (1st Cir. 1988)). In this case, Claimant worked in the same job since 1968, and his pre-existing permanent impairments resulted from work related injuries. Claimant was a member of the ILA, and Employer had access to sufficient and unambiguous information regarding the fact that Claimant had a serious and lasting physical problems.

**H(3) Contribution**

To establish the contribution element Employer must show, by substantial evidence, that Claimant's ultimate permanent partial disability was not due solely to the work injury, but in fact, was materially and substantially greater due to Claimant's pre-existing disability. 33 U.S.C. § 908 (f)(1) (2003); *Director, OWCP v. Ingalls Shipbuilding, Inc.*, 125 F.3d 303 (5th Cir. 1997). Employer must offer some proof of the extent of the permanent partial disability had the pre-existing injury never existed so that the Administrative Law Judge may determine if Claimant's permanent partial disability is materially and substantially greater due to the pre-existing disability. *Id.* at 308. The Board further noted that the Administrative Law Judge may resolve the inquiry "by inferences based on such factors as perceived severity of pre-existing disabilities and the current employment injury, as well as the strength of the relationship between them." *Id.* at 307; *Ceres Marine Terminal v. Director OWCP*, 118 F.3d 387, 391 (5th Cir. 1997).

**H(3)(a) Extent of Claimant's Subsequent Injury Alone**

As discussed *supra*, Part IV Section B(2) the extent of Claimant's December 4, 1998 workplace injury is such that Claimant cannot lift over fifty pounds, cannot climb rung type ladders, and Claimant should avoid prolonged overhead work.

**H(3)(b) The Relationship Between Claimant's Existing Permanent Partial Disability and Subsequent Injury**

Claimant's pre-existing permanent impairments were associated with injuries to Claimant's ankle, eye and back, as outlined above. Claimant's December 4, 1998 workplace injury was to his left shoulder. Based on the record, I find insufficient evidence to suggest that Claimant's December 4, 1998 workplace injury aggravated or exacerbated any pre-existing permanent partial impairment.

**H(3)(c) Determining Whether Claimant's Current Permanent Partial Disability is Due Solely to the Subsequent Injury or Whether the Pre-Existing Injury Materially and Substantially Contributes to Claimant's Current Disability.**

In this case, Claimant was able to engage in heavy or very heavy work prior to his December 4, 1998 workplace accident. While Dr. Licciardi opined on February 8, 1973, that Claimant should

avoid carrying heavy loads, walking on beams, or climbing heights because of Claimant's weak ankle, over time Claimant was able to return to work at full duty without any restrictions, as Dr. Licciardi had predicted. (EX 13, p. 27-29, 31-32). Only as a result of his December 4, 1998 workplace accident was Claimant restricted to medium level work and unable to resume his former job. Indeed, a review of the medical reports reveals a dearth of complaints to Claimant's physicians concerning his leg, back or eye. While Dr. Laborde and Ms. Favaloro testified that Claimant's current condition was materially and substantially worse because of his pre-existing impairments, Claimant did not suffer a permanent disability as a result of his pre-existing injuries, and but for Claimant's December 4, 1998 workplace injury, I find that Claimant would have been able to continue his longshore employment. Therefore, I find that Claimant's current disability is due solely to his December 4, 1998 workplace accident, and I find that Employer failed to prove entitlement to Section 8(f) relief.

## I. Interest

Although not specifically authorized in the Act, it has been an accepted practice that interest at the rate of six percent per annum is assessed on all past due compensation payments. *Avallone v. Todd Shipyards Corp.*, 10 BRBS 724 (1974). The Benefits Review Board and the Federal Courts have previously upheld interest awards on past due benefits to insure that the employee receives the full amount of compensation due. *Watkins v. Newport News Shipbuilding & Dry Dock Co., aff'd in pertinent part and rev'd on other grounds, sub nom. Newport News v. Director, OWCP*, 594 F.2d 986 (4th Cir. 1979). The Board concluded that inflationary trends in our economy have rendered a fixed six per cent rate no longer appropriate to further the purpose of making Claimant whole, and held that "...the fixed per cent rate should be replaced by the rate employed by the United States District Courts under 28 U.S.C. § 1961 (1982)". This order incorporates by reference this statute and provides for its specific administrative application by the District Director. *See Grant v. Portland Stevedoring Company, et al.*, 17 BRBS 20 (1985). The appropriate rate shall be determined as of the filing date of this Decision and Order with the District Director.

## J. Attorney Fees

No award of attorney's fees for services to the Claimant is made herein since no application for fees has been made by the Claimant's Counsel. Counsel is hereby allowed thirty (30) days from the date of service of this decision to submit an application for attorney's fees. A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file

any objections thereto. The Act prohibits the charging of a fee in the absence of an approved application.

## V. ORDER

Based upon the foregoing Findings of Fact, Conclusions of Law and upon the entire record, I enter the following Order:

1. Employer shall pay to Claimant temporary total disability compensation pursuant to 33 U.S.C. § 908(b) of the Act from January 11, 1999 to January 31, 1999, and from August 2, 1999 to December 22, 1999, based on an average weekly wage of $1,393.97, and a corresponding compensation rate of $871.76.

2. Employer shall pay to Claimant permanent total disability compensation pursuant to 33 U.S.C. § 908(a) of the Act from December 23, 1999 to April 16, 2000, based on an average weekly wage of $1,393.97, and a corresponding compensation rate of $871.76, adjusted pursuant to 33 U.S.C. § 910(f).

3. Employer shall pay to Claimant permanent partial disability payments pursuant to 33 U.S.C. § 908(c)(21) of the Act from April 17, 2000 to April 23, 2003, based on an average weekly wage of $1,393.97, an adjusted residual wage earing capacity of $310.30 per week, and a corresponding compensation rate of $722.45.

4. Employer shall pay to Claimant permanent partial disability payments pursuant to 33 U.S.C. § 908(c)(21)(h) of the Act from April 24, 2000 and continuing, based on an average weekly wage of $1,393.97, an adjusted residual wage earing capacity of $227.45 per week, and a corresponding compensation rate of $777.68.

5. Employer shall provide to Claimant all future reasonable medical care and treatment arising out of his work-related injuries pursuant to Section 7(a) of the Act.

6. Employer shall be entitled to a credit for all wages paid to Claimant after January 11, 1999.

7. Employer shall pay Claimant interest on accrued unpaid compensation benefits. The applicable rate of interest shall be calculated immediately prior to the date of judgment in accordance with 28 U.S.C. §1961.

8. Employer is not entitled to take a credit against its compensation obligation pursuant to 33 U.S.C. § 933(f) while Claimant's third-party federal court judgment is stayed pending appeal.

9. Employer's petition for Section 8(f) relief is denied.

10. Claimant's Counsel shall have thirty (30) days to file a fully supported fee application with the Office of Administrative Law Judges, serving a copy thereof on Claimant and opposing counsel who shall have twenty (20) days to file any objection thereto.

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CLEMENT J. KENNINGTON
Administrative Law Judge